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September 25, 1998

*BY HAND DELIVERY*

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

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SEP 25 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Deployment of Wireline Services Offering Advanced  
Telecommunications Capability, CC Docket No. 98-147**

Dear Ms. Roman Salas:

Enclosed please find an original and four copies of the comments of MindSpring enterprises, Inc. in the above-referenced proceeding. Also enclosed is a diskette with the comments in read only format. Please contact the undersigned if you have any questions.

Sincerely,



Patricia Green

cc: ITS

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Deployment of Wireline Services Offering     )  
Advanced Telecommunications Capability     )     CC Docket No. 98-147

To: The Commission

**RECEIVED**

**SEP 25 1998**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**COMMENTS OF MINDSPRING ENTERPRISES, INC.**

Charles M. Brewer  
Chairman and Chief Executive Officer  
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September 25, 1998

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In the Matter of

Deployment of Wireline Services Offering     )  
Advanced Telecommunications Capability     )     CC Docket No. 98-147

To: The Commission

**COMMENTS OF MINDSPRING ENTERPRISES, INC.**

MindSpring Enterprises, Inc. ("MindSpring") submits its comments here in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, FCC 98-188 (released Aug. 7, 1998).

**EXECUTIVE SUMMARY**

MindSpring is one of the nation's leading Internet Service Providers, with a particular focus on residential and small business customers. The company started as a local ISP in Atlanta in 1994, and has grown to become regional and now national in scope. MindSpring currently serves over 400,000 customers in 45 states, and employs over 650 people. MindSpring has consistently earned top marks for quality of service and customer satisfaction. It was named the ISP with the best customer support by *PC World* magazine in December 1997.

MindSpring agrees that FCC action is needed to promote the deployment of local wireline plant capable of supporting packet-switched services over the Internet. We and our customers have an immediate need for broadband, “always on,” last mile loops. We are literally chomping at the bit waiting to purchase local network capacity that will unleash the Internet’s full potential to improve the lives of all Americans.

However, as the transition from a circuit to a packet-switched network proceeds, the challenge will be to preserve and expand customer choice -- not close it down by giving the last mile owner the ability to exploit its market power. MindSpring strongly supports the FCC’s conclusions that the market-opening provisions of the Telecom Act did not exempt ILEC data services or new technologies. 1/ We also believe that the Commission’s related Advanced Services Notice of Inquiry lays the groundwork for a vital discussion of how today’s vigorous Internet-related competition can be preserved and enhanced in the future. 2/

This competition has blossomed because customers have been able to reach the ISP of their choice on a dial-up basis that the ILEC cannot block. However, in the next stage of Internet development consumers will require a

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1/ NPRM at ¶¶ 32-62

2/ See Notice of Inquiry, CC Docket No. 98-146, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 98-187 (released Aug. 7, 1998)(“Notice of Inquiry”).

dedicated, “always on” broadband connection to the Internet; dial up service will not be enough. The loop owner then will have new and increased market power to discriminate in favor of its own ISP affiliate. It can interpose its own Internet gateway at the end of the broadband loop, standing between the customer and any other point on the Net. And it can make it impossible, or at least economically impractical, for consumers to access other ISPs over that dedicated broadband connection. The individual and small business customers served by MindSpring are particularly at risk, for they will be the most dependent on the current last mile owner.

MindSpring has discussed this problem in detail in connection with the Commission’s Notice of Inquiry. We have called for the Commission to preserve what we call an “Open Systems World,” a world in which the last mile owner does not exercise market power over the Internet. We also have suggested tools the Commission should consider to address this problem. 3/

Here MindSpring focuses on the Commission’s proposal to allow ILECs to create structurally separated subsidiaries through which they would offer so-called “advanced services.” The Commission suggests that if such a subsidiary is adequately separated from the ILEC’s residual local exchange operations, it could be freed of Section 251 interconnection obligations and allowed to offer services on a

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3/ See MindSpring Comments, CC Docket No. 98-146 (filed Sept. 14, 1998) (hereafter “MindSpring NOI Comments”). MindSpring asks that its NOI Comments also be incorporated by reference in the docket here.

deregulated basis. (For convenience MindSpring will refer to the new subsidiary as the “New LEC” and the remaining business unit as the “Old LEC”).

MindSpring believes that by far the best solution to the last mile problem would be full divestiture of the ILEC’s local wireline operations from the provision of Internet services over those facilities. Any less complete solution will preserve ILEC incentives and abilities to discriminate in favor of its affiliate. This Commission and the states will be required to scrutinize ILEC activity closely to enforce non-discrimination principles -- less so if meaningful structural separation rules are in place, but on a resource-intensive and continuing basis nonetheless.

The NPRM “advanced services” plan itself is seriously flawed in ways that would violate the Telecommunications Act. First, the plan splits the ILEC in the wrong place. It creates a division based on new services vs. old, even though both “new” and “old” services depend upon the same last mile network over which the ILEC has market power. Indeed, as discussed above, that market power will increase as all loops become dedicated in an Internet world. Yet the NPRM plan would allow the ILEC to shift next generation network plant into the New LEC, leaving the Old LEC (and ILEC competitors) with lower capacity and circuit-switched facilities that will be increasingly out of date in an Internet world. Second, the NPRM plan does not adequately address the incentives and ability of the overall ILEC enterprise to discriminate against competitors. The proposed structural rules are necessary but not sufficient to prevent ILEC abuses. In all



these circumstances, the New LEC would have to be treated as an “ILEC” for purposes of the Telecom Act interconnection rules and other purposes.

That said, MindSpring would not oppose a plan to allow an ILEC to create a separated “New LEC” if lines are drawn in the right place and discrimination safeguards are improved. In particular, the Old LEC must retain sole responsibility for the last mile within the overall ILEC enterprise. Old LEC would maintain, expand and enhance the last mile network, and sell use of that network to all service providers (including the New LEC) on the same terms. Absent full divestiture, the New LEC cannot be allowed to deploy last mile facilities of its own. Even then regulators would need to work hard to police continuing ILEC incentives to give New LEC preferential use of the last mile. But at least in these circumstance New LEC could otherwise be freed from Section 251 and treated as non-dominant with respect to its own services.

MindSpring will leave it to CLECs to discuss the Commission’s specific proposals with respect to central office collocation and use of the ILEC local loops. We strongly support the FCC’s proposal to improve opportunities for CLECs to use ILEC network elements to offer broadband services. However, ISPs should not have to become CLEC-style managers of local exchange plant in order to reach our customers.

Finally, MindSpring remains concerned that the last mile problem extends beyond the ILEC to the other wire owner, the cable operator. We realize that this NPRM is focused only on ILECs, and we will stick to that subject.

However, MindSpring believes that the Commission must address last mile bottleneck power wherever it exists. Thus, the decisions here may also be relevant to cable operators, especially if ILECs do not or cannot deploy broadband loops to large numbers of residential and small business premises, or if that capacity cannot be used by multiple ISPs.

**I. THE TELECOM ACT REQUIRES THE COMMISSION TO FOSTER OPEN SYSTEMS AND UNLIMITED CONSUMER CHOICE IN INTERNET-RELATED SERVICES.**

**A. The Role Of “Open Systems” in Internet Development.**

The Commission’s NPRM proposals must be evaluated based on whether they advance statutory mandates for an “Open Systems World.” In such a world consumers would continue to be able to connect easily with the ISP of their choice, and “last mile” entry barriers for ISPs would remain low. As a result, Internet-related services could continue their explosive and unregulated growth, while any remaining regulation would center on the last mile network itself.

“Open Systems” principles are at the core of the Telecommunications Act. For example, Section 230(b) of the Act affirms a national policy to preserve the vibrant competition in Internet services that exists today:

It is the policy of the United States to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for

the Internet and other interactive computer services,  
unfettered by Federal or State regulation. 4/

But this “vibrant competition” has been possible only because ILECs have not been able to use their control of the last mile to deny consumers the ability to reach ISPs of their choice. “Open System” principles also are inherent in Section 706, which emphasizes that advanced telecom capability should be deployed in a way that “promot[es] competition.” 5/ More generally, the Commission has obligations to support competition arising out of the core of its governing charter, including Sections 201, 202, 214 and 251.

As telecom technology changes, the Commission must ensure that such technology does not become a new weapon that last mile owners such as the ILECs can use to block competition. Rather, that technology should be used to break down the residual market power that still remains in the local network.

MindSpring discussed the importance of “Open Systems” in detail in its NOI Comments. 6/ To summarize briefly, “Open Systems” are needed in a broadband world for at least three key reasons. First, the Commission must preserve the ability of ISPs and other non-last mile owners to drive technology innovation. Experience has shown that the exchange telephone and cable industries have been slow to participate in the Internet world, whether because of

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4/ 47 U.S.C. § 230(b).

5/ Pub. L. 104-104, Title VII § 706(b)(emphasis added), 110 Stat. 153, reproduced in notes under 47 U.S.C. § 157 (hereafter cited as § 706).

6/ MindSpring NOI Comments at 3-17.

inertia, fears that the Internet might cannibalize their businesses, or other problems.

Second, ISP competition is necessary to ensure that customers have choices with respect to the key parameters of price, service design, and customer support. MindSpring would particularly emphasize the latter. To date ISPs have helped connect individual computers to the developing applications of the Internet. This role is complicated enough to make customer support far more significant than it has been in a conventional telephony world. But support will be even more important in the future as ISPs help customers use the broadband packet loop to provide connectivity for a collection of devices in the home or office, ranging from phone-like equipment to two-way video tools, monitoring and control, and other advanced applications not yet imagined. Indeed, MindSpring suggests that as we evolve to a broadband world, today's ISPs will evolve into "Connectivity Service Providers" with a broad function to help consumers take full advantage of all packet-switched applications made possible by the Internet.

Third, "Open Systems" are important because the broadband local loop will be the path over which Americans will access much of their future information content. Internet gateway providers have an increasingly active role in helping customers process information and reach content -- through the choice of primary search engines, blocking and filtering tools (including the selection of default gateway features), preferential visibility to links for particular web sites, or provisioning of their own content. It is important to recognize that these decisions

are editorial in nature. The nation has a strong interest in maintaining low entry barriers for ISPs with differing points of view so that the local loop owner cannot exercise disproportionate power over content matters, advancing its own editorial perspectives.

**B. The Increasing ILEC Market Power In a Broadband World.**

This proceeding is so critical because the last mile market power of ILECs is likely to increase as the local network evolves to meet customer demands for an “always on,” broadband, packet-switched two-way loop. As noted above, until recently consumers generally have been satisfied with dial-up access to ISPs over the narrowband phone network. But this connectivity will no longer be sufficient now that modems and other customer premises equipment are capable of much faster speeds, and as Internet-based applications increasingly are designed to take advantage of dedicated high speed packet technology. In the future consumer requirements for broadband local loops will only increase as new equipment and applications are designed for homes and offices that rely on those “always on” connections to the Internet. 7/

It follows that dedicated connectivity must be available that can link customers to any ISP on terms that do not discriminate in favor of the ISP affiliate

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7/ Of course, some business users already are taking advantage of faster modems and other technology by acquiring broadband connectivity to the Internet. The point is that increasingly all Americans will demand broadband connections. MindSpring is impatiently waiting to migrate its own residential and small business customers to high speed Internet connections.

of the last mile owner. Unfortunately, this result cannot be left to the market. The Commission is well-aware of the ILECs' long history of exploiting their last mile control to prevent competition. 8/ As consumer requirements evolve to "always on" applications, the ILEC's market power increases because it is no longer satisfactory for consumers to "dial-around" the ILEC over the circuit-switched network.

ILECs predictably will argue that they face competition in meeting consumer needs for local broadband. For example, they may point to cable industry plans to upgrade the second wire into many premises. However, such assertions should not influence the Commission's analysis here. MindSpring does not disagree that broadband cable presents competitive issues. But those issues arise from the market power that the cable operator also may come to enjoy as local access becomes broadband-based. At this point it is not even clear that ILECs and cable operators will be equally suited to deploy broadband in all areas. But in any event, the number of broadband loops to a premise typically will be none, one, or perhaps two. Every other ISP will require connectivity over one of those loops to reach the customer.

ILECs also may argue that they face competition from wireless technologies. However, the reality is that wireless is not an adequate substitute for "always on," two way broadband connectivity available over wire. MindSpring does not state this fact with any pleasure. We actively investigate terrestrial wireless

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8/ See MindSpring NOI Comments at 18-21.

and satellite last mile options. The unfortunate truth is that these technologies are not competitive with wireline, and will not be for at least the foreseeable future. Some of them depend upon a dial-up return path which by definition fails to meet demand for two-way broadband and “always on” service applications. MindSpring is not suggesting that wireless may not meet certain specialized requirements, particularly in the large business market. 9/ We also concede that eventually technical obstacles may be overcome such that customer premises will be served by enough different last mile facilities to consider that market competitive. But our point is that this day will not come in the next five to ten years, and in the meantime Americans cannot be left without competitive choice.

MindSpring recognizes that this NPRM focuses on ILECs, and the balance of our comments will follow suit. But we also support the Commission’s consideration of how to harmonize its regulatory treatment of last mile owners, and particularly cable operators. The recent report on Internet over Cable opens a very timely inquiry into the role of cable plant in promoting Internet competition. 10/ The cable issue may prove less important if (1) the ILEC plant is able to provide ubiquitous broadband connectivity and (2) barriers to use of the ILEC plant by CLECs are so

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9/ Wireless services, despite their flaws, may also have a place in rural areas where it is not economical to upgrade wireline plant. Our point, however, is that where wireline broadband is deployed, it alone will be able to meet the true demands for two-way high speed service.

10/ B. Esbin, Internet Over Cable: Defining the Future in Terms of the Past, OPP Working Paper Series No. 30 (August 1998)(hereafter “Internet Over Cable”).

low that consumers have multiple last mile paths to reach ISPs. MindSpring is skeptical on both points, at least in the near term. But cable wireline is an issue for another day. For now we will focus on the market power inherent in ILEC last mile plant.

**II. THE SEPARATE AFFILIATE PROPOSAL AS WRITTEN WOULD VIOLATE SECTION 251 OF THE TELECOM ACT .**  
**[NPRM SECTION VI(B)(2)]**

**A. Only Full Separation Through Divestiture Would Eliminate ILEC Incentives to Discriminate in the Internet Services Market.**

MindSpring believes the Commission is on the right track in exploring structural remedies to address the ILEC's last mile market power. However, the proposal here draws lines in the wrong places, and contains too few safeguards to prevent anticompetitive ILEC conduct. These problems are discussed further below.

First, however, we would emphasize that the most effective way to accelerate local broadband deployment would be through full divestiture of the ILEC last mile from the provision of Internet-based services over those facilities. Full separation was the recipe that created the competitive long distance market in the 1980s. The same recipe can "preserve" and "promote" the "vibrant" Internet competition the nation enjoys today, as required by Section 230(b) of the Act. ILECs would then have an incentive to build the broadband last mile networks that ISPs have been waiting to purchase. And ILECs would have an incentive to offer



the last mile on an "Open Systems" basis to meet the requirements of all Internet applications, including those still to be developed as the Internet evolves.

MindSpring will set aside the question of under what circumstances the Commission might order full separation through divestiture. We observe that cross-ownership restrictions have been used in the past to promote competition and information diversity. 11/ The Commission should also note that some telecommunications firms have voluntarily spun off parts of their business enterprise to reduce regulation, cure conflicts of interest and maximize shareholder value. 12/ ILECs eventually may choose the same path if they become convinced that they will not be allowed to freely exercise their last mile market power to dominant the Internet market. In that event they may recognize the benefits to

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11/ See, e.g., 47 C.F.R. §73.3555 (rules prohibiting newspaper-broadcast cross-ownership, and restricting ownership of same market radio and television stations); 47 C.F.R. § 76.501 (rules restricting ability of cable operator to own broadcast or satellite master antenna service in its franchise area); 47 U.S.C. § 572 (restricting combinations of local exchange telephone companies and cable operators in the same market).

12/ For example, AT&T spun off its equipment company, creating Lucent, to correct the conflict of interest it faced trying to be a supplier to both its own telecom service operations and those of its competitors. Similarly, US West divested its cable operations, MediaOne Group, in part to reduce the conflicts and regulatory issues arising from, in its words, "sitting on both sides of the telco/cable fence." See Interview with Chuck Lillis, President, MediaOne Group, Broadcasting & Cable, April 20, 1998, at 58.

The most famous divestiture of all -- the break up of the Bell System -- was voluntary in a real sense, even though it came in the form of a consent decree in an antitrust case. For present purposes, however, what is significant is that both shareholders of AT&T, as well as long distance consumers, all reaped substantial benefits from this divestiture.

investors of full separation, with shareholders receiving interests in both (i) an unregulated services company, and (ii) a separate last mile company that would require regulation until the local loop actually is competitive.

Absent full separation, however, the Commission must be careful not to unleash ILEC last mile market power -- power that, as discussed above, will increase as all Americans come to require dedicated two way connectivity to the Internet. The NPRM proposal, unfortunately, fails this test.

**B. The NPRM Does Not Draw the Separation Line in the Right Place.**

**1. The Proposal Would Illogically Separate the ILEC Based on New/Old Services, Rather Than Last Mile/Non-Last Mile Ownership.**

The NPRM proposes that an ILEC be allowed to create a partially separated subsidiary -- which for convenience we refer to as “New LEC” -- that would offer “advanced services” as a nondominant carrier. New LEC would be excused from meeting the interconnection obligations of the Telecom Act because, the FCC posits, with sufficient structural separation it would not be a “successor or assign” of the current ILEC operating company -- which we refer to here as “Old LEC.”

However, the NPRM proposal is built on a fundamentally flawed premise: that it is possible to draw a rational distinction between old “conventional” services and new “advanced” services. This is a false dichotomy, as the Commission itself recognized when it rejected ILEC arguments that “data

services” and new technologies are not covered by the Telecom Act. 13/ And it is a dangerous dichotomy, for all services -- old and new -- rely on the ILEC wireline loop to connect to customer premises.

The problem begins with the very definition of “advanced services,” which the NPRM describes as “wireline broadband telecommunications services.” 14/ The Commission further defines “broadband” as “sufficient capacity -- or ‘bandwidth’ -- to transport large amounts of information,” and states that as technology evolves, the amount of capacity considered to be broadband “will evolve with it.” 15/

Yet the NPRM seems to disregard that the ILECs already offer “broadband” services today -- in the form of dedicated special access and transport. The NPRM does not answer the question of where the line between “narrow” and “broadband” capacity would be drawn -- at the DS-O level? Fractional T-1? T-1? DS-3? The NPRM side-steps (or misses) this question because any line would be entirely arbitrary. We are talking about a single ILEC local exchange network. Depending upon where the ILECs have made investment to date, they can and do offer “advanced services” i.e. dedicated telecommunications services above the DS-O level. The larger the customer, the more likely it is that the ILEC has deployed

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13/ NPRM at Section V(A).

14/ Id. at ¶ 3.

15/ Id. at n.4. The Commission adds that “we may consider today’s ‘broadband’ services to be ‘narrowband’ services when tomorrow’s technologies appear.” Id.

“broadband” capacity that the customer can use on a dedicated basis to interconnect with the Internet or for other purposes.

The NPRM proposal, then, contains a hole that an ILEC could drive the proverbial truck through. Essentially any new local exchange investment could be deemed to support “advanced services” insofar as it increases network capacity. This would be true whether the ILEC is deploying new fiber cable or upgrading electronics to a large business, installing xDSL equipment to reach customers with lower capacity needs, or anything in between. The NPRM proposal, however, would allow all such investment to be made in New LEC for that affiliate’s exclusive use. The only limitation is that Old LEC would not be allowed to transfer its current local loop inventory, in its current condition, to New LEC. But New LEC would face no limitations on the additional last mile investment it would make. And Old LEC apparently would have no continuing obligation to install and improve the last mile itself. 16/

It follows that, although the NPRM speaks in terms of a separated “advanced services” subsidiary, the proposal is unbounded. The New LEC would be permitted to provide any and all services using dedicated last mile loops to any and all customer premises. The New LEC would become the repository of all network enhancements related to dedicated local exchange and exchange access services.

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16/ The only exception is that Old LEC apparently would have to make any investment required to provide conventional last mile voice grade, circuit switched service. However, the need for and value of this investment will decline rapidly in an Internet-based world.

And significantly, the New LEC would assume this position at the very time that technology is demanding that (i) every customer premise obtain dedicated “broadband” links to the Internet and its related applications, and (ii) that larger customers expand the “broadband” -- i.e. greater than DS-0 -- last mile connections they have today.

**2. Any ILEC Last Mile Network Must Be Subject to Section 251 Until the Loop is Fully Competitive.**

Because New LEC would enjoy a preferential last mile position, the NPRM proposal for partial separation would violate Section 230(b) and 706 of the Telecom Act. As discussed above, these provisions require the Commission to preserve competition in the Internet market and prevent ILECs from exploiting their last mile ownership position. 17/ The NPRM proposal also would violate the Commission’s own conclusion that Section 251(c) requires the ILECs to provide access and interconnection to all network elements, and not just the ones traditionally associated with voice telephony. 18/ The Commission can forbear from this requirement only if the interconnection provisions of the Act have been “fully implemented” and are no longer needed to serve the public interest. 19/ That time obviously has not yet come.

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17/ 47 U.S.C. § 230(b).

18/ NPRM at Section V(A).

19/ 47 U.S.C. § 160.

The NPRM suggests that the separate subsidiary plan would not violate the Act because New LEC would not be a “successor or assign” of the ILEC under Section 251(h). However, this is a mere assertion without a factual foundation. The NPRM does not discuss what it means to be a “successor,” but clearly New LEC would be “succeeding” to the role of Old LEC in providing dedicated last mile network. To rule otherwise would be to drain Section 251(h) of its meaning. That provision was included in the Act specifically to prevent ILECs from evading their responsibility to share with competitors their local exchange network elements (including network investment made after the Act was passed).

MindSpring submits that, so long as the ILEC can decide whether to deploy last mile network elements in either Old LEC or New LEC, both affiliates must be considered “ILECs” subject to Section 251. New LEC would be an ILEC “successor” as a matter of law under Section 251(h)(1) because it would succeed to the right and ability to replace Old LEC as the provider of facilities-based dedicated last miles to customers. It does not matter that the ILEC may choose to sell dedicated access through both the Old LEC and New LEC.

Beyond that, the Commission also should make clear by rule that in these circumstances New LEC would hold a position “comparable” to that of Old LEC under Section 251(h)(2). By definition if the ILEC enterprise can decide whether to deploy last mile facilities in either Old LEC or New LEC, then both are

“comparable” carriers. 20/ Such a ruling is important because ILECs already are establishing their own so-called “CLEC affiliates” through which they try to evade the obligations of the Telecom Act and of regulation aimed at ILEC market power. 21/

Finally, it should go without saying that the so-called “advanced services” New LEC could not be treated as a nondominant carrier. Because New LEC would enjoy the ability to deploy exclusive last mile facilities, it would be able to exploit that position against non-last mile owners such as other ISPs.

The Commission may hope that eventually the last mile will become sufficiently competitive to allow forbearance from Section 251 under the legal standards of the Telecom Act. MindSpring is skeptical that the ILEC’s last mile dominance will erode soon, particularly to the premises of individual consumers and small businesses. We also do not believe that the Act’s standards would be met simply by CLEC use of the ILEC last mile network elements. But in any event, the Commission’s new proposals in this NPRM to promote local competition underscore

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20/ New LEC would occupy the position of Old LEC as last mile service provider for any customer requiring new or expanded dedicated connectivity, as provided in Section 251(h)(2)(A). New LEC would “substantially replace” Old LEC for all such customers, as described in subsection (B). Finally, treatment of New LEC as a “comparable carrier” is clearly consistent with the public interest in preventing evasion of Section 251’s mandate that ILECs cooperate with competitors to make available their local network elements.

21/ The Competitive Telecommunications Association discusses this problem in its pending petition for declaratory ruling. See Commission Seeks Comment on Petition Regarding regulatory Treatment of Affiliates of ILECs, CC Docket No. 98-39, 13 FCC Rcd 6669 (1998).

how far we are from seeing low last mile entry barriers even on a UNE basis. Until ILECs lose their local loop market power, the Commission cannot excuse them from their interconnection obligations based on an ILEC's decision to deploy last mile facilities in a new affiliate.

**C. The New ILEC Subsidiary Would Not Be Adequately Separated.**

The NPRM proposal also depends in part on an assumption that New LEC will be adequately separated from Old LEC such that “it will not derive an unfair advantage from its relationship with the incumbent.” 22/ The Commission suggests that if separation is adequate, then New LEC should not be deemed a “successor or assign” of Old LEC.

The Commission recognizes the obvious danger that Old LEC would discriminate in favor of its New LEC affiliate. The Commission sets forth a number of “separation requirements” aimed at this problem. 23/ Collectively these requirements attempt to make New LEC a separately managed company from Old LEC, limit transfers of property to the New LEC, and require relations between Old and New LEC to be carried out on an open and non-discriminatory basis.

Although well-intentioned, these requirements suffer from a basic problem: they attempt to reduce the ability of the ILEC to discriminate without in any respect reducing its incentive to do so. MindSpring does not minimize the

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22/ NPRM at ¶ 83.

23/ Id. at ¶ 96



former. We strongly agree that structural separation can benefit the public by making it more difficult for the ILEC to abuse its market power, and by making it easier for regulators to monitor and enforce non-discrimination rules. But partial separation is not a substitute for full divestiture, or a basis for reducing the policing of the ILEC in the absence of a full split. Structural separation, however, can have the benefit of making that policing more effective to protect consumer choice. 24/

That said, MindSpring sees two major weaknesses in the NPRM proposals. First, they are inherently flawed unless, as discussed above, Old LEC alone is responsible for all last mile local network operations. The Commission contemplates that all parties would deal with Old LEC on the same terms as New LEC. However, the NPRM proposal would allow the ILEC parent enterprise to decide how to manage overall corporate investment and marketing by steering resources to New LEC and withholding them from Old LEC. This problem will be particularly pernicious insofar as last mile activity is concerned. The ILEC enterprise will have every incentive to manage Old LEC to offer only what New LEC needs to supplement its own activity. As only one example, a customer may want a larger capacity loop to an ISP like MindSpring and go to Old LEC to request it. Under Section 251 that loop could be available either as part of the ILEC's own services, or at least as a UNE that could be used by others. But under the NPRM

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24/ MindSpring does not necessarily concede that an ILEC ever could side-step Section 251 by setting up a wholly-owned affiliate. Again, we believe that full separation is the only way to isolate the ILEC's last mile market power. But even putting that legal question aside, the NPRM proposal is inadequate.

proposal Old LEC may refuse to offer this service to the customer because it wants the customer to buy the loop from New LEC, where the customer would be locked into New LEC's ISP and other services.

More generally, Old LEC would have far more opportunities to discriminate if New LEC is allowed to deploy exclusive last mile network. Old LEC can grant preferences in price, in availability of network elements, collocation opportunities, conduit and rights of way, and many other parameters. The NPRM would prohibit such conduct, but it does not fully appreciate the huge resources that would be required to audit ILEC conduct and enforce the rules. MindSpring appreciates that these discrimination problems will exist for CLECs whether or not partial separation occurs. But our point is that they cannot be allowed to contaminate the competitive Internet market by giving ILECs a means to exploit their last mile ownership over competing ISPs. This contamination would occur if the New LEC is able to use the fruits of discrimination to compete as an ISP on an unregulated basis.

The second major problem with the NPRM proposal is that it does not adequately deal with the ILEC's incentives to engage in anticompetitive cost-shifting. The NPRM suggests without explanation that affiliate transaction rules would prevent "telephone ratepayers" from covering the cost of "competitive ventures." 25/ However, nothing in the proposal would prevent Old LEC from

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25/ NPRM at ¶96.

charging New LEC and its competitors excessive amounts for the use of Old LEC services or assets, to the net benefit of the ILEC corporation. Furthermore, since Old LEC would generally be under price cap regulation, profits from this conduct would go to ILEC shareholders because Old LEC would not need to reduce its rates to consumers.

These dangers are exacerbated by the fact that Old LEC and New LEC apparently would be allowed to market services together. As a result, New LEC will have the full benefit of Old LEC's historical position as vendor to 100% of the local customer base. The ILEC enterprise can use these relationships, and any supra-competitive profits derived from its last mile position, to subsidize pricing in markets where it faces the most competition.

Again, the best answer to all of these problems would be full divestiture of the last mile ILEC operations. Short of that, the Commission and the states will have a continuing need to regulate ILEC conduct, with all the resource demands that this entails. Partial structural separation makes that regulatory task easier, especially with respect to discrimination problems. But it is not the whole answer.

### **III. AN ALTERNATIVE PLAN FOR STRUCTURAL SEPARATION.**

#### **[NPRM SECTION VI(B)(2)]**

Despite its flaws, the Commission's proposal does provide the foundation for a discussion of how an ILEC affiliate might safely be allowed to offer

unregulated broadband services. MindSpring shares the Commission's frustration with the status quo. We agree that more must be done to encourage ILECs to deploy broadband last mile plant. However, that plant must be available to all parties on an "Open Systems" basis.

Even if the Commission is not prepared to order last mile divestiture (by far the best solution to the last mile Internet barrier), then it still must look to that remedy for the structure of any partial separation plan. The Commission will not be curing incentives of the overall ILEC enterprise to discriminate, but it at least may simplify the task of policing such discrimination.

**A. Last Mile Plant Should Only Be Operated by the Regulated Operating Company.**

First, the Commission must draw the separation line in the right place -- between the last mile operation and the services using that last mile.

MindSpring has discussed above why it is illogical, impractical, and counter to the Telecom Act to draw distinctions on any other basis. On the other hand, consumer interests would be served if all last mile ILEC activity was centered in the Old LEC, and companies needing connectivity over that network (including New LEC) could purchase that connectivity on the same terms and conditions.

This solution is not perfect; incentives to discriminate would remain. Furthermore, ILECs are likely to continue to slow-roll broadband deployment to prevent cannibalization of their existing service products, and to prevent unaffiliated firms from offering services to customers before New LEC is ready to

compete. ILECs will tend to increase bandwidth in the large business market where they face the most competition, but be far slower to meet today's unsatisfied demand in the residential and small business markets. Nevertheless, partial separation at least should improve the existing situation, where discrimination is even more difficult to detect and deter.

**B. The Old LEC Operating Company Should Be Required to Offer Last Mile Connectivity for Packet Data On Equal Terms to All ISPs.**

MindSpring assumes that under this structure an ILEC would offer ISP and other packet-switched services through the unregulated New LEC. 26/ The Old LEC should be required to provide last mile connectivity for this purpose to New LEC and all competitors on equal terms.

MindSpring discussed this principle previously in its comments in response to the Advanced Services NOI. 27/ We explained that we recently entered into an agreement with a competitive cable company that could serve as a model for such an arrangement. MindSpring interconnects with a router at the cable headend, and the cable operator transports data packets over its HFC network to and from our customer's premise. MindSpring supplies and installs customer

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26/ MindSpring assumes that even under the NPRM partial separation plan the ILEC would not be allowed to offer broadband services through both Old LEC and New LEC, with the latter unregulated. Such a mix and match approach would undermine the foundation of separation. However, the NPRM is not clear on this issue. See Section E, *infra*.

27/ MindSpring NOI Comments at 28-30.

premises equipment and provides other end user Internet support. We pay the cable operator to connect to their router on a per customer basis. Significantly, this kind of transport arrangement can be done on a non-exclusive basis. Various ISPs can attempt to win the customer, and the successful vendor can then use the transport to the customer premise.

MindSpring strongly believes that regulators must prohibit discrimination by an ILEC against unaffiliated ISPs whether or not the ILEC separates its ISP activities into a separate affiliate. Our point here is only that such separation, done correctly, could be associated with reduced regulation of the non-last-mile ILEC subsidiary.

**C. The Commission Should Consider Additional Structural Safeguards to Address ILEC Market Power.**

As discussed above, the separation requirements set forth in the NPRM are necessary but not sufficient to address all competitive issues presented by the ILEC market power. We agree that they should be adopted in full, but we also recommend that the Commission consider additional remedies to deter discrimination and reduce the ability of the overall ILEC enterprise to obtain monopoly rents, especially rents that can be used to cross-subsidize more competitive activities. MindSpring understands that other parties will be addressing this issue in detail and we may comment further after reviewing their views.

**D. No Network Assets Should Be Transferred to the New LEC Affiliate.**

MindSpring strongly submits that the Old LEC should not be allowed to transfer to or share any network assets with New LEC. Any other conclusion would undermine the goal of establishing an affiliate that does not draw unfairly on the benefits of its affiliation with the last mile owner.

The NPRM suggests that Old LEC would not be allowed to transfer bare loops, but would be allowed to transfer “facilities used specifically to provide advanced services, such as DSLAMs, packet switches and transport facilities other than the loop itself.” 28/ The short answer is that no such transfers should be permitted because New LEC should not be providing the last mile for the reasons discussed above. 29/ If it is, then New LEC is also an incumbent LEC subject to Section 251 interconnection rules.

**E. The New LEC Affiliate Should Not Receive Any Assets Related to Old LEC’s Customer Base.**

Finally, the NPRM raises important issues with respect to other assets that the ILEC might transfer to its unregulated New LEC affiliate. We agree that employees could be transferred -- provided that Old LEC retains employees with the experience to conduct the last mile business. Indeed, this is another reason why last mile operations must remain wholly with Old LEC. The ILEC otherwise will

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28/ NPRM at ¶108.

29/ This renders moot the Commission’s question regarding whether New LEC could receive such asset transfers “in place.” See id. at ¶110.

have an incentive to give New LEC those employees most familiar with the last mile network, leaving Old LEC in a poor position to supply customers who want broadband connectivity to reach New LEC competitors.

Special care is required not to give New LEC advantages related to a unique asset -- Old LEC's ubiquitous relationship with every customer in its serving area. New LEC cannot be given preferential ability to exploit those relationships through access to Old LEC's customer information, let alone transfer of customer accounts themselves.

More generally, the NPRM does not pay adequate attention to two much larger issues related to how Old LEC and New LEC interact with respect to customers. First, New LEC should not be allowed to engage in joint marketing activities with Old LEC given that no other service providers will have a similar opportunity to interface with customers and sell products together. Otherwise New LEC will have substantial advantages related to its ability to offer so-called "new" services with jointly with Old LEC's conventional local exchange products.

Second, and more fundamentally, the Commission should give more consideration to how lines are drawn between the services that a New LEC can offer on an unregulated basis, and those offered by the Old LEC. This question immediately arises with regard to dedicated last mile connectivity provided by ILECs today. Under the Commission's scheme, for example, it apparently would be possible for an ILEC to offer "broadband" T-1 loops through either the regulated ILEC as today, or the New LEC -- or both. The NPRM is not clear as to whether, if



an ILEC sets up an unregulated subsidiary, it would be able to pick and choose which entity markets to which customers. This problem will increase as all customers come to demand dedicated lines (of some capacity) as their primary source of connectivity to the Internet and other end user services.

Again, MindSpring believes that ultimately the answer should be divestiture of the last mile network, with the ILEC operator of that network out of the business of providing end user retail services altogether. But short of full divestiture, the Commission should consider how to reconcile these issues in the context of its structural proposals. At a minimum, the ILEC last mile ownership should remain with the regulated Old LEC operating company.

**IV. THE COMMISSION MUST ENSURE THAT ISPS CAN PURCHASE CONNECTIVITY OVER ILEC LOOPS ON NON-DISCRIMINATORY TERMS AND CONDITIONS.**

**[NPRM SECTION 6(C)]**

The NPRM contains a number of proposals intended to enhance the ability of CLECs to use ILEC network elements to assemble their own last miles capable of providing broadband connectivity. MindSpring fully supports improvements to the Commission's rules that would permit CLECs to better deploy high speed loops. Stronger interconnection policies are crucial if CLECs are to have any chance of providing the next generation of local exchange services.

MindSpring will leave it to the CLECs themselves to address the adequacy of the Commission's proposals for collocation and last mile unbundling.

However, we have several comments from the perspective of ISPs who will require use of broadband connectivity between ourselves and our customers.

**A. ISPs Cannot Be Required To Become CLEC-Style Operators Of Local Exchange Networks In Order To Reach Their Customers.**

First of all, ISPs are not CLECs, and we should not have to become CLECs to continue our key role in the Internet revolution. An ISP's expertise is in helping people access and make use of the Internet, including the multiple Internet-based service applications that will arise in the future. We specialize in establishing and then supporting Internet applications at the customer premise -- which today is focused on access through personal computers, but tomorrow will include support for many other Internet-related devices installed on the premise. We also are active at our gateway, specializing in helping users more efficiently reach useful content and services accessible on the Internet. But our expertise is not in local network construction, operation and management. We need others to sell us connectivity to carry data packets between our customer and our gateway.

Of course, ILECs and CLECs may want to offer Internet access themselves, but this is not a reason why ISPs should be forced to enter the local exchange business to remain competitive. Perhaps some ISPs may decide to become CLECs, assembling local networks from UNEs and their own installed plant. But the Commission must not create an environment in which every ISP is effectively required to do so because it has no other efficient and practical way to connect with customers. That result would create a major barrier to Internet competition and, as

discussed above, could give ILECs and CLECs a disproportionate advantage in promoting their own editorial perspectives. 30/ In short, it would kill the “vibrant” Internet competition that Section 230(b) of the Telecom Act charged the Commission to preserve and promote.

**B. ILECs Must Provide Non-Discriminatory Last Mile Connectivity Even If The Proposed CLEC Rules Are Adopted.**

It follows from the above that, even assuming the Commission adopts its CLEC-related interconnection rules, this would in no way eliminate the need to ensure that ILECs sell last mile connectivity to ISPs on reasonable and non-discriminatory terms. First of all, the mere potential for CLEC last mile loops does nothing to address an ISP’s requirement for broadband connectivity on as ubiquitous a basis as the ILEC itself enjoys. While the NPRM proposals are useful, the Commission still will have to test them in practice against the natural recalcitrance and discrimination incentives of the ILECs. CLECs have had serious problems enforcing their interconnection rights even in the relatively straightforward circuit-switched environment. It remains to be seen where CLECs actually can and will deploy local broadband network.

Second, and in any event, CLECs using ILEC UNEs are unlikely to be a source of broadband connectivity to ISPs serving the residential and small business market any time soon. CLECs are naturally focusing on the large business segment, and will continue to do so over the next several years, . Thus, no

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30/ See Section I, supra.

matter what CLEC-related rules the Commission adopts here, they are not a substitute for enforcing obligations on ILECs to supply non-last-mile ISPs with connectivity to the customer on the same terms and conditions that the ILEC provides to its own affiliated ISP business.

MindSpring has previously discussed its concern that cable operators may come to exercise market power based on their ownership of the only (or one of only two) broadband wires to a customer premise. In our comments in response to the Advanced Services NOI we commended the Commission for opening a dialog concerning how to treat Internet services provided over cable. 31/ MindSpring believes that customers must have the ability to select the ISP of their choice if the only broadband access to their premise is provided over cable. And even if the customer is served by broadband owned by both the cable company and the ILEC, he or she still should be able to select both (i) the preferred last mile network to connect to the Internet, and (ii) the preferred ISP who will help the customer use that connectivity to draw information and services from the Web. 32/

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31/ MindSpring NOI Comments at 9.

32/ This approach essentially consists of an unbundling of the consumer's purchase of loop facility supplier from the purchase of ISP services. The consumer may or may not have more than one broadband facility to its premise. If not, it still can reach the ISP of its choice. If so (say both an ILEC wire and a cable wire), the consumer can choose which wire he or she prefers, as well as which ISP to provide services over that wire.

These are matters that go beyond the specific questions presented in the NPRM. For present purposes, MindSpring would simply reemphasize that as last mile connectivity requirements evolve to broadband, ISPs must continue to be able to reach any customer -- including any individual or small business customer -- who has access to a broadband-capable loop. ILECs must offer non-discriminatory last mile connectivity to all ISPs, whether or not this obligation also should apply to the cable operator.

### CONCLUSION

The NPRM correctly recognizes that ILECs have a strong incentive to discriminate against non-last-mile owners. The best solution to this problem would be full divestiture of the ILEC's last mile operation from the business of providing services over that local network. The ILEC last mile company would then have an incentive to build and sell broadband connectivity from customers to as many different ISPs as possible.

Short of that, structural separation at least can make ILEC discrimination more difficult, and enforcement of non-discrimination rules less costly and difficult. Unfortunately, the NPRM's proposed "advanced services" subsidiary does not further those goals. It fails to separate the ILEC last mile from services offered over that network. Instead, it allows the ILEC to migrate non-competitive last mile activities to the New LEC subsidiary, and allows the subsidiary to fully exploit the resulting market power against unaffiliated ISPs.

This result would violate Section 251(h) of the Telecom Act, which was included in the Act expressly to prevent an ILEC from evading its local interconnection duties through corporate shell games.

The Commission at least must revise its structural separation proposal to require that last mile network only be owned by the regulated Old LEC operating company. The Commission also must take other actions to better address the incentives and opportunities for discrimination in favor of the New LEC subsidiary that the parent ILEC holding company would retain in the absence of full separation. More generally, the Commission should ensure that last mile connectivity is offered to all ISPs on nondiscriminatory terms and conditions. This requirement is necessary whether or not the ILEC chooses to adopt a separation plan arising out of this rulemaking proceeding, and whether or not the Commission's proposals with respect to CLEC broadband deployment eventually permit CLEC competition to develop.

Finally, the Commission should make clear to ILECs that structural separation is only a tool that permits a reduction in regulatory oversight. If New LEC is properly organized, its services can be treated as non-dominant. But the Commission and others will still need to scrutinize Old LEC-New LEC relationships, and Old LEC conduct, to ensure that the overall ILEC enterprise is not engaged in the anticompetitive conduct that it still would have every incentive to pursue. This regulatory oversight could be reduced from that which would be required if the ILEC continued to integrate its last mile and retail service activity.

But full deregulation should be reserved for full separation through divestiture, whether done by the ILEC on a voluntary basis or otherwise.

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*by PM*

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September 25, 1998

**CERTIFICATE OF SERVICE**

I, Patricia A. Green, hereby certify that on this 25th day of September, 1998,  
a copy of the Comments of MindSpring Enterprises, Inc. filed in CC Docket No. 98-147 was  
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